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THE LIABILITY OF SOCIAL HOSTS FOR THEIR INTOXICATED GUESTS' AUTOMOBILE ACCIDENTS — AN EXTENSION OF THE LAW

Levin: Liability of Hosts for their Intoxicated Guests' Automobile Accidents

There is a national trend toward raising minimum drinking ages and imposing harsher drunken driving laws.¹ Drunken driving has killed over 250,000 people in the past ten years, averaging 25,000 lives per year.² According to national statistics, an alcohol-related traffic fatality occurs every twenty minutes.³ As of January, 1981, fourteen states raised their minimum-age drinking laws,⁴ and only twenty-eight states now permit drinking by persons under twenty-one years.⁵ Further, in the summer of 1984, Congress passed a statute which rewards states with more highway funds if they raise the minimum drinking age to twenty-one.⁶

As a result of this trend, injured victims are looking for ways to recover damages for their injuries. One method has existed since before Prohibition. For years, injured victims used dram shop acts or a common law negligence theory to recover from a business proprietor who served the minor or the intoxicated individual. Recently, injured victims have attempted to sue social hosts who served the tort-feasor. The cause of action against a private host evolved from a trend of holding taverns or business proprietors liable, but two major points have developed. First, courts are limiting the holdings to the facts of the cases. For example, many courts first impose liability on servers of minors and wait for a case involving an adult to develop. Other courts refuse to hold the server of an adult liable while leaving the door open in the case of a minor. These limited decisions have probably arisen because of public policy concerns. Second, courts are struggling to interpret the dram shop acts and liquor control statutes in order to apply them to social hosts. The cases are usually overruled by the legislature, resulting in controversy between legislatures and courts over this issue. For these reasons, a cause of action predicated on traditional negligence principles is the best way to impose liability. The New Jersey Supreme Court recently used common law negligence principles to hold a social host liable for injuries sustained by the plaintiff in an accident with a drunken guest.⁷ This decision has raised many fears about serving liquor at a private party.

This comment will first address the historical trend leading to the liability

¹Coleman Jr., *The Right Motive, but the Wrong Solution*, 70 A.B.A.J. 18 (April, 1984).

²Comment, *DWI Laws: Getting Tough on Drunks*, 28 S.D.L. REV. 491 (1983).

³*Id.* at 491.

⁴Williams, Zador, Harris, and Karpf, *The Effect of Raising the Legal Minimum Drinking Age on Involvement in Fatal Crashes*, 12 J. LEGAL STUD. 169, 169 (1983).

⁵*Making it Tougher to Drink and Drive*, NEWSWEEK, July 9, 1984, at 23.

⁶National Minimum Drinking Age, Pub. L. No. 98-363, § 158, 98 Stat. 437 (1984).

⁷*Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984).

of social hosts. It will then address the three ways an injured victim might allege a cause of action, and will discuss the problems and implications of holdings of liability of each theory.

A HISTORICAL PERSPECTIVE — DRAM SHOP ACTS

According to the traditional common law rule, it was not a tort to serve a person an alcoholic beverage; therefore, a person injured by an intoxicated individual did not have a cause of action against the person who served the liquor.⁸ The courts reasoned that the proximate cause of injury was the drinking of liquor and not the furnishing of it.⁹ While most of these cases discussed the possible liability of one who supplied the liquor for sale, some courts addressed the liability of one who gratuitously provided the alcohol.¹⁰

The times leading to Prohibition had a direct impact on this rule. The movement began as far back as 1850, but three waves of temperance reform resulted in the passage of National Prohibition by the Eighteenth Amendment in 1920.¹¹ The prohibitionists also lobbied state legislators to pass dram shop acts (or civil damages acts) to provide a statutory cause of action against the person selling the liquor.¹² Thirty-seven states have at one time had some form of dram shop act imposing liability.¹³ After Prohibition was repealed in 1933, few states continued statewide prohibition. By 1966, all had abandoned it.¹⁴ The states also began to repeal the dram shop acts.¹⁵ In 1966 and 1967, twenty-two states had a dram shop act. This number was reduced to twenty in 1972.¹⁶ Today, seventeen states have such acts;¹⁷ however, some of the recent statutes

⁸E.g., *Megge v. United States*, 344 F.2d 31 (6th Cir.) cert. denied, 382 U.S. 831 (1965); *Campbell v. Village of Silver Bay*, 315 F.2d 568 (8th Cir. 1963); *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965); *Brockett v. Kitchen Boyd Motor Co.*, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972); *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963). See also 45 AM. JUR. 2d *Intoxicating Liquors* ¶ 553, n. 11, (1969). In the absence of statute, the consumer of intoxicants was unable to recover against the person furnishing the drinks for personal injuries resulting from the inebriation. *Campbell*, 315 F.2d at 573. See also *Lee v. Peerless Ins. Co.*, 248 La. 982, 183 So. 2d 328 (1966). Annot. 54 ALR. 2d 1152 (1957).

⁹*Colligan*, 38 Ill. App. 2d at 412, 187 N.E.2d at 300 (quoting 30 AM JUR. *Intoxicating Liquors*, § 520); *Carr*, 238 Ark. at 890, 385 S.W.2d at 657; *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966) (quoting 30 AM. JUR. *Intoxicating Liquors*, § 520); see generally 45 AM JUR. 2d, *supra* note 8, *infra* n. 12 and 13.

¹⁰E.g. *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889); *Harris v. Hardesty*, 111 Kan. 291, 207 P. 188 (1922); see also Annot. 8 A.L.R. 3d 1412 (1966).

¹¹See, e.g. C. MERZ, *THE DRY DECADE*, 2-5 (1931).

¹²See, e.g. Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 175 (1958); 12 AM. JUR. TRIALS 729, *Dramshop Litigation: Note. Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest*, 59 N.D. L. REV. 445 (1973).

¹³McGough, *Dram Shop Acts*, A.B. A. SEC. OF INS. NEGL. & COMPENSATION L. 448, 451 (1967).

¹⁴18 ENCYCLOPEDIA BRITANNICA, 609, 612 (1964).

¹⁵Comment, *Dram Shop Liability — A Judicial Response*, 57 Calif. L. Rev. 995 (1969).

¹⁶Note, *Extension of the Dram Shop Act: New Found Liability of the Social Host*, 49 N.D.L. Rev. 67, 70 (1972).

¹⁷See ALA. CODE § 6-5-71 (1977); ALASKA STAT. § 04.21.030 (1980); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1975); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1984); IOWA CODE ANN. § 123.92 (West Supp. 1984); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); MICH. COMP. LAWS.

provide that the server will not be liable.¹⁸ No state without a pre-existing dram shop act imposing liability has adopted one since 1935.¹⁹

THE SEARCH FOR AN ALTERNATIVE

Different occurrences led to the adoption of a new common law negligence theory, making it possible for the injured victim to recover from the tavern proprietor. First and most obvious, a majority of the states had no statute upon which a claim could rest. Next, intoxicated individuals were still inflicting damage which in some cases exceeded the amount that an intoxicated tortfeasor could compensate.²⁰ The taverns were clearly the deep pockets.²¹ Finally, the remaining dram shop acts did not cover all situations. The courts in these jurisdictions had to determine whether the statutes were exclusive, or whether the common law could fill in gaps not covered by the statutes.

Courts willing to change the common law rule were faced with two major obstacles. The traditional rule was based on the theory that the tavernkeeper owed no duty to the injured party and the theory that the proximate cause of the injury was the drinking of alcohol and not the serving of it. Courts would have to reexamine these theories. However, all states have enacted liquor control laws²² either prohibiting the sale or furnishing of alcohol to minors,²³ or to

ANN. § 436.22 (West Supp. 1984); MINN. STAT. ANN. § 340.95 (West Supp. 1984); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1983); N.D. CENT. CODE § 5-01-06 (Supp. 1983); OHIO REV. CODE ANN. § 4399.01 (Page 1982); PA. STAT. ANN. tit.47, § 4-497 (Purdon 1969); R.I. GEN. LAWS § 3-11-1 (1976); UTAH CODE ANN. § 32-11-1 (Supp. 1983); VT. STAT. ANN. tit.7 § 501 (1972).

¹⁸See e.g. CA. BUS. & PROF. CODE § 25602 (Supp. 1984); CA. CIVIL CODE § 1714 (Supp. 1984); COLO. REV. STAT. § 13-21-103 (1973); PA. STAT. ANN. tit. § 47.4-497 (Purdon, 1969).

¹⁹McGough, *supra* note 13, at 451.

²⁰Note, *Liquor Vendor Liability for Injuries Caused by Intoxicated Patrons — A Question of Policy*, 35 OHIO ST. L.J. 630,631 (1974).

²¹*Id.*

²²See ALA. CODE §§ 28-7-21, 28-3-260 (1977 & Supp. 1984); ALASKA STAT. § 04.16.051 (1980); ARIZ. REV. STAT. ANN. §§ 4-241, 4-244(D) (1974); ARK. STAT. ANN. §§ 48-529, 48-902.1, 48-903 (1977); CA. BUS. & PROF. CODE §§ 25602, 25658 (West 1964 & Supp. 1984); COLO. REV. STAT. § 12-47-128 (1978 & Supp. 1984); CONN. GEN. STAT. § 30-86 (West 1975 & West Supp. 1984); DEL. CODE ANN. tit. 4, § 713 (Supp. 1984); D.C. CODE ANN. § 25-121 (Supp. 1984); FLA. STAT. ANN. §§ 562.11, 562.50 (West Supp. 1983); GA. CODE ANN. §§ 3-3-22, 3-3-23 (1982); HAWAII REV. STAT. § 281-78 (1976); IDAHO CODE §§ 23-312, 23-929 (1977); ILL. ANN. STAT. Ch. 43, § 131 (Smith-Hurd Supp. 1984); IND. CODE ANN. §§ 7.1-5-7-8, 7.1-5-10-14, 7.1-5-10, 7.1-5-10-15 (1982 & West Supp. 1984); IOWA CODE ANN. § 123.49 (West Supp. 1984); KAN. STAT. ANN. § 41-715 (1981); KY. REV. STAT. § 244-080 (Baldwin 1980); LA. REV. STAT. ANN. §§ 14-91 26:88, 26:683 (West 1974 & West Supp. 1984); ME. REV. STAT. tit. 28, §§ 303, 1058 (Supp. 1984); MD. ANN. CODE art. 2B, § 118 (Supp. 1984); MASS. GEN. LAWS ANN. Ch. 138, §§ 34, 69 (West 1974 and West Supp. 1984); MICH. COMP. LAWS ANN. §§ 436.29, 436.33 (1978 and Supp. 1984); MINN. STAT. ANN. § 340.73 (West 1972 and West Supp. 1984); MISS. CODE ANN. §§ 67-1-81, 67-1-83 (Supp. 1984); MO. ANN. STAT. § 311.310 (Vernon 1963); MONT. CODE ANN. §§ 16-6-304, 45-5-624 (1983); NEB. REV. STAT. § 53-180 (1984); NEV. REV. STAT. § 202.055 (1979); N.H. REV. STAT. ANN. § 175:6 (Supp. 1983); N.J. STAT. ANN. 33:1-39,1-77 (West Supp. 1984); N.M. STAT. ANN. § 60-7A-16, 60-7B-1 (1978); N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 1970 & McKinney Supp. 1984); N.C. GEN. STAT. § 18B-305 (1983); N.D. CENT. CODE 5-01-09 (1975); OHIO REV. CODE ANN. § 4301.69 (Page 1982); OKLA. STAT. ANN. tit. 37, § 537 (West Supp. 1984); OR. REV. STAT. § 471.410 (1981); PA. STAT. ANN. tit. 47, § 4-493 (Purdon 1969 & Purdon Supp. 1984); R.I. GEN. LAWS §§ 3-8-1, 3-8-6 (Supp. 1984); S.C. CODE ANN. § 61-3-990 (Law Co-op. Supp. 1983); S.D. CODIFIED LAWS §§ 35-4-78, 35-9-1 (1977 & Supp. 1984); TENN. CODE ANN. § 57-4-203 (Supp. 1984); TEX. ALCO. BEV. CODE ANN. §§ 101.63, 106.03 (Vernon 1978 & Vernon Supp. 1984); UTAH CODE ANN. §§ 32-7-14, 32-7-15 (1974); VT. STAT. ANN. tit. 7, § 658 (Supp. 1984); VA. CODE §4-62 (1983); WASH. REV. CODE § 66.44.270 (1962); W.VA. CODE 60-3-22 (1984); WIS. STAT. ANN. § 125.07 (West Supp. 1984); WYO. STAT. § 12-6-101 (1981).

²³E.g., CAL. BUS. & PROF. CODE § 25658 (West Supp. 1984); GA. CODE ANN. § 3-3-23 (1982); IND. CODE ANN.

intoxicated persons,²⁴ or to both.²⁵ If the courts could establish that these laws were designed to protect injured third parties, the courts could find a duty on the part of tavernkeepers — a violation constituting negligence per se.²⁶

In 1958, the Superior Court of Pennsylvania followed this route in *Schelin v. Goldberg*,²⁷ holding that the Pennsylvania Liquor Code could be used to establish negligence per se on the part of a tavernkeeper who served a visibly intoxicated patron. This holding enabled the patron to recover for injuries. The Seventh Circuit went one step further in *Waynick v. Chicago's Last Dep't Store*,²⁸ holding that tavernkeepers were liable in tort for damages and injuries sustained by third parties. This court also used a penal statute to establish negligence per se.²⁹

The third and probably most cited landmark case is *Rappaport v. Nichols*.³⁰ In this case, a tavernkeeper sold alcohol to a minor. The minor became intoxicated and caused an automobile accident in which Rappaport died.³¹ The New Jersey legislature had earlier replaced the dram shop act with a liquor control act, but the repeal left common law negligence principles unimpaired.³² The court cited *Schelin* and *Waynick*, and held that "[w]here a tavernkeeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through the action of the intoxicated person or the minor."³³ The court noted that the legislature had prohibited liquor sales to minors because it recognized

§ 7.1-5-7-8 (1982). The Georgia statute provides, in pertinent part: "(a) Except as otherwise authorized by law: (1) No person knowingly, by himself or through another, shall furnish, cause to be furnished, or permit any person in his employ to furnish any alcoholic beverage to any person under 19 years of age." GA. CODE ANN. § 3-3-23 (1982).

²⁴E.g. LA. REV. STAT. ANN. § 26:711 (West 1975); GA. CODE ANN. § 3-3-22 (1982), providing: "No alcoholic beverage shall be sold, bartered, exchanged, given, provided, or furnished to any person who is in a state of noticeable intoxication."

²⁵E.g., ALA. CODE § 28-7-21 (Supp. 1984); ARK. STAT. ANN. § 48-529 (1977); COLO. REV. STAT. § 12-47-128 (1978 & Supp. 1984); CONN. GEN. STAT. § 30-86 (West Supp. 1984); IDAHO CODE § 23-312 (1977). The Colorado statute provides, in pertinent part: "(1) It is unlawful for any person: (a) To sell, serve, give away, dispose of, exchange, or deliver or permit the sale, serving, giving, or procuring of any malt, vinous, or spiritous liquor to or for any person under the age of twenty-one years, to a visibly intoxicated person, or to a known habitual drunkard." COLO. REV. STAT. § 12-47-128 (1978 & Supp. 1984).

²⁶See *infra* p. 14.

²⁷188 Pa. Super. 341 146 A.2d 648 (1958).

²⁸269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1966).

²⁹*Id.* at 325-26.

³⁰31 N.J. 188, 156 A.2d 1 (1959). This is the same court that recently recognized social host liability based on common law negligence principles apart from a penal statute.

³¹*Id.* at 192, 156 A.2d at 3.

³²*Id.* at 201, 156 A.2d at 8.

³³*Id.* Although the court ultimately relied upon a violation of a penal statute to find negligence per se, the court was clearly articulating negligence standards apart from negligence per se. This reasoning laid the groundwork for courts finding negligence on the part of tavernkeepers as well as social hosts apart from a statute.

the inherent danger which results when minors drink; the serving of alcohol to the minor or intoxicated person creates an unreasonable risk of harm to the minor, the intoxicated person, and the traveling public.³⁴ Thus, the liquor control statute protected the general public and a violation constituted negligence per se.

The court dealt with the proximate cause obstacle by viewing the sale of intoxicating beverages as a substantial factor in producing the injuries.³⁵ Realizing that it was making a major change in the law, the court stated:

[W]e are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burdens upon defendants who can always discharge their civil responsibilities by the exercise of due care.³⁶

Many courts followed the lead of *Rappaport* in abandoning the traditional common law rule. These courts reasoned that "the common law, which is judge-made and judge-applied, can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy."³⁷ Liability was imposed for personal injury³⁸ and death.³⁹ Some courts expressly noted that the repeal of dram shop acts did not prevent this remedy.⁴⁰ Most courts used the penal liquor laws to establish negligence per se,⁴¹ reasoning that these statutes were enacted not only to protect the specific individual from himself, but to protect the general public from the intoxicated individual.⁴² The courts also reasoned that the tavernkeeper can be a contributing cause if the injury is foreseeable.⁴³ Some courts in states with dram

³⁴*Id.*

³⁵*Id.* at 203, 156 A.2d at 9.

³⁶*Id.* at 205, 156 A.2d at 10.

³⁷*Ontiveros v. Borak*, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983). See also *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983).

³⁸See *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal Rptr. 623 (1971); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); See also Annot., 97 A.L.R.3d § 3 528 (1980); Annot., 75 A.L.R.2d 833 § 6 (1961).

³⁹See *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 431 N.E.2d 920 (1982); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E. 2d 18 (1967); *Munford, Inc. v. Peterson*, 368 So.2d 213 (Miss. 1979); Annot., 97 A.L.R. 3d, § 4 *supra* note 38.

⁴⁰See *Adamian*, 353 Mass. at 500, 233 N.E.2d at 19; *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 631, 198 A.2d 550, 553 (1964).

⁴¹See *Ontiveros*, 136 Ariz. 500, 667 P.2d 200; *Ono v. Applegate*, 62 Haw. 131, 612 P.2d 533 (1980); *Munford*, 368 So. 2d 213.

⁴²*Walz v. City of Hudson*, 327 N.W.2d 120 (S.D. 1982); *McClellan*, 666 P.2d 408; *Adamian*, 353 Mass. 498, 233 N.E.2d 18.

⁴³*Nazareno v. Urie*, 638 P.2d 671 (Alaska 1981); *Ontiveros*, 136 Ariz 500, 667 P. 2d 200; *Ono*, 62 Haw. 131, 612 P.2d 533; *McClellan*, 666 P.2d 408.

shop acts also adopted this rule, holding that the dram shop act did not preempt the field.⁴⁴ Other states refused to recognize that violations of these penal laws resulted in negligence per se, preferring to defer to the legislature to impose liability.⁴⁵

Fewer courts were willing to extend a common law liability to tavernkeepers apart from the penal statutes.⁴⁶ Many of these cases rested primarily on violations of penal law and recognized negligence principles as an alternative theory. *Sorensen by Kerscher v. Jarvis*⁴⁷ is the most recent case to apply this theory to tavernkeeper liability. The court refused to defer to the legislature, which had recently failed to pass a bill imposing liability. The court also addressed policy reasons for the change in the common law.

Thus, the majority of jurisdictions have abrogated the traditional common law rule and have held tavernkeepers liable for the negligent acts of their intoxicated patrons.⁴⁸ The rationale for this change is clearly justified because of the penal statutes and higher duties imposed on the proprietor engaged in selling and furnishing alcohol.

SOCIAL HOST LIABILITY

Courts now recognized tavernkeeper liability by three separate methods: the dram shop act, a liquor control statute, or common law negligence theories apart from any statute. As a result of the trend toward changing the common

⁴⁴*Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965); *Mason v. Roberts*, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973); *Trail v. Christian*, 298 Minn. 101, 213 N.W.2d 618 (1973).

⁴⁵*Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965); *Runge v. Watts*, 180 Mont. 91, 589 P.2d 145 (1979); *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976); *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969); *Yoscovitch v. Wasson*, 645 P.2d 975 (Nev. 1982).

⁴⁶*Rappaport*, 31 N.J. 188, 156 A.2d 1; *Campbell v. Carpenter*, 279 Or. 237, 566 P.2d 893 (1977); *Colligan*, 38 Ill. App.2d 392, 187 N.E.2d 292.

⁴⁷119 Wis. 2d 627, 350 N.W.2d 108 (Wis. 1984).

⁴⁸The following states have abrogated the traditional common law rule of nonliability: Arizona: *Ontiveros*, 136 Ariz. 500, 667 P.2d 200, *Brannigan v. Raybrick*, 136 Ariz. 513, 667 P.2d 213 (1983); Alaska: *Nazareno*, 638 P.2d 671; Colorado: *Kerby v. The Flamingo Club, Inc.*, 35 Colo. App. 127, 532 P.2d 975 (1974); Florida: *Davis v. Shiappacosse*, 155 So. 2d 365 (Fla. 1963); *but see* *Armstrong v. Munford, Inc.*, 451 So. 2d 480 (Fla. 1984); *Migilore v. Crown Liquors of Broward*, 448 So. 2d 978 (Fla. 1984); Hawaii: *Ono*, 62 Haw. 131, 612 P.2d 533; Idaho: *Algeria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980); Indiana: *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); Iowa: *Lewis v. State*, 256 N.W. 2d 181 (Iowa 1977); *Haafke v. Mitchell*, 347 N.W.2d 381 (Iowa 1984); Kentucky: *Pike v. George*, 434 S.W.2d 626 (Ky. 1968); Massachusetts: *Adamian*, 353 Mass. 498, 233 N.E.2d 18, *Michnik-Zilberman v. Gordon's Liquor, Inc.* 390 Mass. 6, 453 N.E.2d 430 (1983); Michigan: *Thaut v. Finley*, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Minnesota: *Trail*, 298 Minn. 101, 213 N.W.2d 618; Mississippi: *Munford*, 368 So. 2d 213, *Carver v. Schafer*, 647 S.W. 2d 570 (Mo. App. 1983); New Hampshire: *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965); New Jersey: *Rappaport*, 31 N.J. 181, 156 A.2d 1; New Mexico: *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269; New York: *Berkely*, 47 Misc. 2d 381, 262 N.Y.S.2d 290; Ohio: *Mason*, 33 Ohio St.2d 29, 294 N.E.2d 884; Oregon: *Campbell*, 279 Or. 237, 566 P.2d 893; Pennsylvania: *Jardine*, 413 Pa. 626, 198 A.2d 550; South Dakota: *Walz*, 327 N.W.2d 120; Tennessee: *Brookins v. The Round Table*, 624 S.W.2d 547 (Tenn. 1981); Washington: *Callan v. O'Neill*, 20 Wash. App. 32, 578 P.2d 890 (1978), *Young v. Caravan Corporation*, 99 Wash. 2d 655, 663 P.2d 834 (1983); *Torres v. Salty Sea Days, Inc.*, 36 Wash. App. 668, 676 P.2d 512 (1984); Wisconsin: *Sorensen by Kerscher v. Jarvis*, 119 Wis. 2d 627, 350 N.W. 2d 108 (1984); Wyoming: *McClellan*, 666 P.2d 408.

law, victims of intoxicated individuals began suing gratuitous servers. Suits arose where plaintiffs sued organizations,⁴⁹ and some dared to sue social hosts. Since some of the suits involved intoxicated minors, courts imposed liability, expressly confining the holdings to the facts of the case. The remainder of this comment will discuss causes of action based on each of these theories.

DRAM SHOP ACTS

A cause of action alleging violation of a dram shop act is the weakest route for a litigant to pursue. First, the legislative trend is to abolish these statutes. Further, these statutes limit who may bring a cause of action and who will be liable.⁵⁰ Finally, some of the statutes limit the amount of recovery.⁵¹ Only three existing statutes unambiguously apply to a seller-licensee.⁵² The rest of the statutes are worded very broadly, applying to "any person" who provides alcohol. While the wording in these broad statutes could arguably apply to social hosts, legislative action or judicial interpretation has limited these statutes to sellers.

The interpretation of the Minnesota statute is a prime example. In *Ross v. Ross*,⁵³ the Minnesota Supreme Court construed the 1972 version of the civil damages act to impose liability on social hosts. The court stated that "the legislature intended to create a new cause of action against every violator whether in the liquor business or not."⁵⁴ The court recognized that "the legislature envisioned [a] limited application of the Civil Damages Act to householders and social drinkers,"⁵⁵ but the court felt that changing times warranted an expansive interpretation of this statute.⁵⁶ The Minnesota Legislature overruled the *Ross* case by deleting the word "giving" from the statute in 1972,⁵⁷ and the present statute still reflects this change.⁵⁸ Subsequent Min-

⁴⁹Plaintiffs suing employers also use respondent superior as an alternative theory when employees host business functions. See, *Romeo v. Van Otterloo*, 117 Mich. App. 333, 323 N.W.2d 693 (1982). This theory might be easier to apply because the plaintiff must merely show that the employee was acting within the scope of his employment. *Id.* at 337, 323 N.W.2d at 695.

⁵⁰The earlier statutes were far more limited on who could recover. Most of the modern statutes grant any person who is injured the right to recover. See e.g., ME. REV. STAT. ANN. tit. 17, § 2002 (1983); MINN. STAT. ANN. § 436.22 (West Supp. 1984).

⁵¹Few modern statutes place monetary limits on recovery. See e.g., ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1983). Most statutes provide for recovery of actual exemplary damages, e.g., ALA. CODE § 6-5-71 (1977); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1983).

⁵²IOWA CODE ANN. § 123.92 (West Supp. 1984); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1984); MINN. STAT. ANN. § 340.95 (West Supp. 1984).

⁵³294 Minn. 115, 200 N.W.2d 149 (1972).

⁵⁴*Id.* at 121, 200 N.W.2d at 152-53.

⁵⁵*Id.* at 119, 200 N.W.2d at 151.

⁵⁶*Id.*

⁵⁷See also *Holmquist v. Miller*, 352 N.W.2d 47,50 (Minn. App. 1984).

⁵⁸MINN. STAT. ANN. § 340.95 (West Supp. 1984).

nesota cases have construed the statute not to apply to social hosts.⁵⁹ A similar situation occurred in Iowa when that state's supreme court applied the dram shop act to a social host in *Williams v. Klemesrud*.⁶⁰ The court differentiated other statutes which have been construed as penal in nature and therefore strictly construed. The Iowa Legislature acted to overrule this case by amending the statute to only apply to licensees or permittees.⁶¹

Other courts have held that the dram shop acts do not apply to gratuitous providers of alcohol. Many commentators state that the courts limit these acts to sellers:

(1) because the purpose of a dram shop act is to suppress illegal liquor sales rather than to extend a remedy to injured parties, courts must strictly construe the statute; (2) courts must base any judicial extension of the dram shop act remedy on the historical facts that motivated the passage of the act; (3) to avoid opening the "floodgates" of litigation, courts should defer any extension of the remedy to the legislature.⁶²

Of the states with dram shop acts today, courts in Illinois,⁶³ Alabama,⁶⁴ New York,⁶⁵ and Ohio⁶⁶ have held that these statutes do not apply to gratuitous servers. Courts in two states which subsequently repealed the statutes made the same holding.⁶⁷ Some courts have used this finding to apply a common law theory instead.⁶⁸

Legislatures and courts are limiting the existing dram shop acts to business proprietors. The statutes in New York and Illinois were amended in 1983,⁶⁹ however, legislatures have chosen to retain this language despite judicial opinions. Therefore, it appears that legislatures are content with these judicial constructions which limit the acts.⁷⁰ The Alabama Legislature has

⁵⁹Cady v. Coleman, 315 N.W.2d 593 (Minn. 1982); Cole v. City of Spring Lake Park, 314 N.W.2d 836 (Minn. 1982); *Holmquist*, 352 N.W.2d 47 (Minn. App. 1984); Meany v. Newell, 352 N.W.2d 779 (Minn. App. 1984).

⁶⁰197 N.W.2d 614 (Iowa 1972).

⁶¹See, IOWA CODE ANN. § 123.92 (West Supp. 1984).

⁶²Note, *supra* note 12, at 454.

⁶³E.g., *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 72 (1889); *Heldt v. Brei*, 118 Ill. App. 3d 798, 455 N.E.2d 842 (1983); *Miller v. Owens-Illinois Glass Co.*, 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964).

⁶⁴DeLoach v. Mayer Elec. Supply Co., 378 So. 2d 733 (Ala. 1979).

⁶⁵Kohler v. Wray, 114 Misc. 2d 856, 452 N.Y.S.2d 831 (Sup. Ct. 1982); *Edgar v. Kajet*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (App. Div. 1976) (mem).

⁶⁶Settlemeyer v. Wilmington Veterans Post No. 49, American Legion, Inc., 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984).

⁶⁷Brockett v. Kitchen Boyd Motor Co., 24 Cal App. 3d 87, 100 Cal. Rptr. 752 (1972); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971).

⁶⁸See e.g., *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); *Wiener*, 258 Or. 632, 485 P.2d 18 (1971).

⁶⁹ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1984); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1983).

⁷⁰See ALA. CODE § 6-5-71 (Supp. 1984) and ALA. CODE § 28-7-21 (Supp. 1984).

limited a civil cause of action to a person who violates a liquor control act. The liquor control act is limited to licensees. The Alaska Legislature has enacted a similar act. According to Alaska statute § 04.21.020, in pertinent part:

A person who provides alcoholic beverages to another person may not be held civilly liable for injuries resulting from the intoxication of that person unless the person who provides the alcoholic beverages holds a license . . . or is an agent or employee of such a licensee and

(1) the alcoholic beverages are provided to a person under the age of 21 years in violation of AS 04.16.051, unless the licensee, agent, or employee secures in good faith from the person a signed statement, liquor identification card, or driver's license . . . that indicates that the person is 21 years of age or older; or

(2) the alcoholic beverages are provided to a drunken person in violation of AS 04.16.030.⁷¹

Colorado,⁷² California,⁷³ and Pennsylvania⁷⁴ have enacted "negative" dram shop acts which state that licensees will not be held civilly liable for furnishing the alcohol. Some courts have not spoken. But it appears from the ones that have spoken that social hosts will not be included in the dram shop acts. Thus, the injured victim must search for another way to state his claim.

NEGLIGENCE PER SE

According to fundamental tort law, the elements of a cause for negligence are the following: 1) a legal duty or obligation that requires the person to conform to a certain standard of conduct for the protection of others against unreasonable risks; 2) a breach of the duty by this person; 3) the breach of the duty as proximate cause of the injury; and 4) damage resulting to the interests of another.⁷⁵ It is also fundamental that violation of a statute may constitute negligence per se.⁷⁶ According to Section 286 of the Restatement of Torts:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

⁷¹ALASKA STAT. § 04.21.020 (Supp. 1984).

⁷²COLO. REV. STAT. § 13-21-103 (1974).

⁷³CA. BUS. & PROF. CODE § 25602 (West Supp. 1984); CA. CIVIL CODE § 1714 (West Supp. 1984).

⁷⁴PA. STAT. ANN. tit 47, § 4-497 (Purdon 1969).

⁷⁵KEETON, PROSSER AND KEETON ON TORTS § 30, at 165 (1984) [hereinafter cited Keeton].

⁷⁶*Id.* at 238.

(d) to protect that interest against the particular hazard from which the harm results.⁷⁷

As a result of a finding of negligence per se, the defendant will be deemed as a matter of law to have breached his duty.⁷⁸ The plaintiff must still prove proximate cause and injury.⁷⁹

Some of the courts have considered the possibility of using penal liquor control acts to constitute negligence per se by the social host. These alleged causes of action probably arose because many of the statutes contain very broad language,⁸⁰ because causes of actions based on violations of dram shop acts generally failed, and because parties took hints from the trend of applying these statutes in cases involving liquor establishments. However, there is a major problem in applying these statutes to social hosts. In order for a statute to be used, the plaintiff and the risk must be covered by the statute.⁸¹ In general, courts have practiced judicial restraint and have not exceeded the purpose of the statute.⁸²

Twenty-two states have penal statutes containing language which clearly applies only to taverns serving intoxicated adults,⁸³ and twenty-five contain specific language for taverns serving minors.⁸⁴ Fourteen states have statutes containing broad language that could reasonably include either sellers or gratuitous providers of alcohol to intoxicated individuals,⁸⁵ and seventeen states' statutes contain broad language concerning servers of minors.⁸⁶ Since the majority of these statutes prohibit sales to minors, differences in the statutes of a particular state permit courts to impose liability in cases involving minors and to avoid doing so where victims are injured by intoxicated adults. It may be that, for reasons of public policy, courts want to impose liability on servers of minors but not on servers of adults. By resorting to a negligence per se analysis alone, courts are establishing the legislature's prerogative to indicate

⁷⁷RESTATEMENT. (SECOND) OF TORTS § 286 (1965).

⁷⁸Keeton, *supra* note 75, at 230.

⁷⁹*Id.*

⁸⁰See Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L. REV. 561, 571 (1980) [hereinafter cited Graham].

⁸¹Keeton, *supra* note 75, at 222.

⁸²*Id.* The class of protected persons may be very broad. The court must interpret the statutory terms in light of the evils to be remedied. *Id.* at 225.

⁸³Alabama, Arkansas, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, North Carolina, Rhode Island, Texas, Virginia, Washington, West Virginia, Wisconsin. See *supra* note 22, for citations to statutes.

⁸⁴Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maine, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Rhode Island, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. See *supra* note 22, for citations to statutes.

⁸⁵California, Colorado, Delaware, Georgia, Iowa, Missouri, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania. See *supra* note 22, for citations.

⁸⁶Colorado, Georgia, Iowa, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee. See *supra* note 22, for citations.

whom the server has the duty to protect third parties from. In this way, courts are avoiding having to establish liability on common law theories. According to one commentator:

A social host more easily can detect and control the drunkenness of a minor than of an adult. Furthermore, a minor is identified more readily as a high risk individual who is more likely to cause an accident. Thus, the risk created when a social host serves liquor to a minor should be more apparent to the social host and should create a more stringent duty owed by the social host to others who might be injured.⁸⁷

The major difficulty in applying the liquor control statutes is that the statute must apply to the defendant. While most liquor control acts discussed above obviously apply to licensees or tavernkeepers, it is questionable whether they apply to social hosts. It is possible these statutes protect against the conduct of social hosts when the statutes contain the broad language, but not all statutes contain this language. Further, courts and legislatures have limited the language to apply only to commercial vendors. Battles between the courts and legislatures have resulted.

Courts refusing to recognize a common law rule of negligence on the basis of a penal statute generally hold that the dram shop act supplies the exclusive remedy. These courts reason that the imposition of liability is the responsibility of the legislature. A majority of these courts have addressed facts where an employer or social host serves an intoxicated adult.⁸⁸ Some cases expressly distinguish these facts from facts in cases in which a minor is involved,⁸⁹ the court leaving the door open in a case involving a minor.

Four states have refused to extend the state's penal liquor laws to impose liability on a gratuitous server.⁹⁰ Two of these cases involved social hosts,⁹¹ one involved an employer,⁹² and one involved a veteran's post.⁹³ The result in these cases has been a determination that the statute does not apply to the defendant. For example, in *Kohler v. Wray*,⁹⁴ a New York Supreme Court refused to apply a liquor control statute to a homeowner who provided beer to an intoxicated adult. Although the statute provided that no person shall give away

⁸⁷Graham, *supra* note 80, at 581.

⁸⁸*E.g.* Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303 (1970).

⁸⁹*E.g.* DeLoach, 378 So. 2d 733; Cartwright v. Hyatt Corp., 460 F. Supp. 80 (D.C.D.C. 1978); Miller, 96 Ill. App.3d 596, 421 N.E.2d 1046 (1981); Archer v. Burton, 91 Mich. App. 57, 282 N.W.2d 833 (1979); LeGault v. Klebba, 7 Mich. App. 640, 152 N.W.2d 712 (1967); Runge, 180 Mont. 91, 589 P.2d 145; Edgar, 55 A.D.2d 597, 389 N.Y.S.2d 631.

⁹⁰*E.g.*, Runge, 180 Mont. 91, 589 P.2d 145; Kohler, 114 Misc. 2d 856, 452 N.Y.S.2d 831 (Sup. Ct. 1982); Serletmyer, 11 Ohio St. 3d 123, 464 N.E.2d 521; Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1973).

⁹¹Kohler, 114 Misc. 2d 856, 452 N.Y.S.2d 831; Runge, 180 Mont. 91, 589 P.2d 145.

⁹²Manning, 454 Pa. 237, 310 A.2d 75.

⁹³Settlemyer, 11 Ohio St. 3d 123, 464 N.E.2d 521.

⁹⁴114 Misc. 2d 856, 452 N.Y.S.2d 831 (1982).

the alcohol, the New York courts had uniformly held that the statute does not apply to a host in a noncommercial setting.⁹⁵ The Montana Supreme Court, in *Runge v. Watts*,⁹⁶ thought it was the duty of the legislature to provide a remedy. The court noted that there is a greater justification for imposing liability on a commercial rather than on a social purveyor, first because of the need to check on the pecuniary motives of the one engaged in business, and second, because a commercial vendor is in a better position to observe customers and monitor level of intoxication.⁹⁷ However, Montana is one of the states which has not adopted a new common law rule of nonliability of liquor vendors. It is not surprising that the court held this way.

At least four legislatures have reacted to their state court's holdings of social host liability by amending their liquor control laws or dram shop statutes.⁹⁸ The actions of the California courts and the legislature are a prime example of what has occurred. In *Strang v. Cabrol*,⁹⁹ the Supreme Court of California addressed a conflict in the appeals courts over whether civil liability for personal injuries may be predicated on the sale or furnishing of alcoholic beverages to a minor who is not obviously intoxicated.¹⁰⁰ The conflict arose from a history of court opinions and legislative amendments. Prior to the amendments, the California courts had imposed liability on social hosts in a variety of situations. In *Vesely v. Sager*,¹⁰¹ the supreme court applied section 25602 of the Business and Professions Code to find negligence per se of a tavernkeeper who served an intoxicated adult. The court stated that the statute was enacted to protect members of the general public from intoxicated persons and damage to property resulting from the excessive use of alcohol. In *Brockett v. Kitchen Boyd Motor Co.*,¹⁰² an appeals court expanded the *Vesely* ruling to cover an employer who served liquor to a minor employee at a Christmas party. The court stated that "the impeccable logic of *Vesely* impels the conclusion that any person, whether he is in the business of dispensing alcoholic beverages or not, who disregards the legislative mandate breaches a duty to anyone who is injured as a result of the minor's intoxication and for whose benefit the statute was enacted."¹⁰³ In *Bernhard v. Harrah's Club*,¹⁰⁴ the

⁹⁵See also *Seittemyer*, 11 Ohio St.2d 123, 464 N.E. 2d 521. In *Holmes v. Circo* 196 Neb. 496, 244 N.W.2d 65 (1976), and *Hamm v. Carson City Nuggett, Inc.* 85 Nev. 99, 450 P.2d 358 (1969), the Nebraska and Nevada courts stated in dicta that the penal statutes could not be applied in a civil setting. The facts in these cases involved a tavernkeeper.

⁹⁶180 Mont. 91, 589 P.2d 145 (1979).

⁹⁷*Id.*, 180 Mont. at 94, 589 P.2d at 147. The Ohio court also made this distinction in *Settlemyer*.

⁹⁸ALASKA STAT. § 04.21.020 (Supp. 1984); CAL. BUS. & PROF. CODE § 25602 (West Supp. 1984); IND. CODE ANN. § 7.1-5-7-8 (West 1982); N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 1970 & Supp. 1983).

⁹⁹ P.2d , 209 Cal. Rptr. 347 (1984).

¹⁰⁰*Id.*

¹⁰¹5 Cal. 3d 153, 486 P. 2d 151, 95 Cal. Rptr. 623 (1972).

¹⁰²24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

¹⁰³24 Cal. App. 3d at 93, 100 Cal. Rptr. at 756.

¹⁰⁴16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

supreme court indicated that while *Vesely* relied upon a statutory violation to make out a breach of duty of care, "there was no bar to civil liability under modern negligence law"¹⁰⁵ against a defendant commercially providing alcohol to an obviously intoxicated person. Finally, in *Coulter v. Superior Court of San Mateo County*,¹⁰⁶ the California Supreme Court applied the liquor control statute to a social host.

The California Legislature reacted to these rulings by amending the statute, expressly overruling these cases. The general principle of section 1714 of the Civil Code¹⁰⁷ providing that everyone is responsible for his own negligent or willful acts is now qualified by subdivision (b) and (c). According to these subdivisions:

(b) It is the intent of the Legislature to abrogate the holdings in cases such as *Vesely v. Sager . . . Bernhard v. Harrah's Club . . .* and *Coulter v. Superior Court* and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

(c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.¹⁰⁸

The legislature also amended section 25602 of the Business and Professions Code,¹⁰⁹ a liquor control statute governing the furnishing of alcohol to any "habitual or common drunkard or to any obviously intoxicated person." Subdivision (c) is similar to 1714(b), and subdivision (b) now provides that no person who commits a misdemeanor pursuant to subdivision (a) ". . . shall be civilly liable to any injured person . . . for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage."¹¹⁰ Finally, section 25658 is a liquor control act governing liquor sales to minors, but this statute contains no express civil immunity to the provider.¹¹¹

In *Strang v. Cabrol*, the plaintiff argued that a commercial vendor could be held liable for selling liquor to a minor who was not obviously intoxicated at

¹⁰⁵*Id.* at 325, 546 P.2d at 726, 128 Cal. Rptr. at 222.

¹⁰⁶21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

¹⁰⁷CA. CIVIL CODE § 1714 (West Supp. 1984).

¹⁰⁸*Id.*

¹⁰⁹CA. BUS. & PROF. CODE § 25602 (West Supp. 1984).

¹¹⁰*Id.*

¹¹¹CA. BUS. & PROF. CODE § 25658 (West 1984).

the time of sale on negligence per se principles because Section 25658 contains no express civil immunity comparable to that contained in Section 25602.¹¹² The court refused to engage in statutory construction which we have seen in the area and concluded that the sweeping civil immunity provided by the 1978 amendments was intended to encompass this situation.¹¹³ The court applied maxim *expressio unius exclusio alterius*.¹¹⁴ According to this rule of construction, an express exclusion from the operation of a statute indicates that the legislature intended no other exceptions are to be implied.¹¹⁵ In this case, Section 25602.1 created the single statutory exception for sales by a licensee to an obviously intoxicated minor. The court stated that "[i]f the Legislature had intended also to exclude sales to sober, underage persons from the reach of the superseding statute, it could have said so directly by amending Section 25658 to that effect."¹¹⁶ After a history of debate on this issue, the California courts and legislature are reaching agreement. Other legislatures have not reacted to these holdings. In *Brattain v. Herron*,¹¹⁷ an Indiana appeals court used a liquor control statute to hold liable a sister who furnished alcohol to her minor brother. This decision is still law.

Whereas the legislatures are overruling supreme court cases imposing liability, lower courts are rejecting the supreme court rulings of nonliability. Two recent decisions have carved out exceptions to the state's existing rule that penal statutes do not apply in social settings. In these recent cases, the lower courts are searching, in the dicta of supreme court cases, for supporting language to impose liability. In *Holmquist v. Miller*,¹¹⁸ a Minnesota appeals court made an exception to the existing rule that the dram shop act preempted the field in a claim of negligence against a social host who served an adult. In this court's view, the floor debates of the dram shop act do not demonstrate that the legislature intended the statute to preempt the field in the case of minors.¹¹⁹ The court also referred to dicta in subsequent supreme court cases to support the imposition of liability. The statutory interpretation in this case is questionable in light of the existing rule that the dram shop act preempts the field. Once a court interprets whether a dram shop act applies to social hosts, it should apply the rule to both minors and adults. Any difference must rest solely on policy reasons. In fact the court did resort to policy, stating that

¹¹² P.2d , 209 Cal. Rptr. 347, 349 (1984).

¹¹³*Id.* at 352.

¹¹⁴*Id.* at 350.

¹¹⁵The court cites 2A SUTHERLAND, STATUTORY CONSTRUCTION 50.01, pp. 268-69 (4th ed. 1973).

¹¹⁶Strang, 209 Cal. Rptr. at.

¹¹⁷159 Ind. App. 663, 309 N.E.2d 150 (1974). See also Giardina v. Solomon, 360 F. Supp. 262 (M.D. Pa. 1973).

¹¹⁸352 N.W.2d 47 (Minn. App. 1984). The court looked to language in Walker v. Kennedy, 338 N.W.2d 254 (Minn. 1983) which implied that there might be a cause of action against a social host. However, the Minnesota Supreme Court has not made a definitive ruling on the issue.

¹¹⁹*Holmquist*, 352 N.W.2d at 51.

[o]ur decision allowing a cause of action also comports with sound public policy. The legislature has recognized that minors should be prevented from purchasing, possessing, or drinking alcoholic beverages Social policy dictates that individuals who procure intoxicating liquor for minors be held liable for damages caused by the intoxicated minor. The social ills from intoxication are grossly aggravated when minors are involved because of their documented inability to cope properly with intoxicating liquor. Imposing civil liability discourages the illegal furnishing of liquor to minors; thus, it serves to promote our strong public policy of preventing our youth from causing senseless damage to themselves and the public.¹²⁰

In *Longstreth v. Fitzgibbon*,¹²¹ a Michigan appeals court engaged in statutory construction in deciding a case where a social host served a minor. The parties had stipulated that a repealed penal statute would have provided a civil cause of action.¹²² However, the state supreme court had held that the revised statute did not provide a cause of action against the private server of an adult. Since the legislature had retained the "giving" and "furnishing" language,¹²³ the appeals court found that the civil cause of action was retained in the case of a minor.¹²⁴ According to the court:

[W]e believe that the Legislature did not intend to eliminate the misdemeanor offense attendant to the furnishing of alcoholic beverages to minors by persons other than licensees under the Liquor Control Act. We note that the Legislature chose to use the word "person" as opposed to retailer, vendor, or licensee in regard to the prohibition against knowingly selling or furnishing liquor to a person who has not attained 21 years of age.¹²⁵

These examples are evidence of a will to avoid existing rules by distinguishing the serving of a minor from that of an adult. Although the results may be desirous for policy reasons, they are legally inconsistent from a statutory construction viewpoint. At least one court has refused to make such a distinction. In *Wilson v. Steinbach*,¹²⁶ the court refused to make such a distinction depending upon the identity of the victim because the relevant inquiry is whether a standard of care has been breached and not whether the intoxicated person has been an adult or a minor.

Courts find little difficulty in applying penal statutes which clearly apply

¹²⁰*Id.* at 52.

¹²¹125 Mich. App. 261, 335 N.W.2d 677 (1983). Michigan does not apply the adult penal statute to establish negligence per se. See *Manuel v. Weitzman*, 386 Mich. 157, 191 N.W.2d 474 (1971); *Hollerud v. Malamis*, 20 Mich. App. 748, 174 N.W.2d 626 (1969).

¹²²*Longstreth*, 335 N.W. 2d at 678.

¹²³MICH. COMP. LAWS ANN. § 436.33 (West Supp. 1984).

¹²⁴*Longstreth*, 335 N.W. 2d at 679.

¹²⁵*Id.*

¹²⁶98 Wash. 2d 434, 656 P.2d 1030 (1982).

to the violator. In *Garcia ex rel. Garcia v. Jennings*,¹²⁷ the court imposed liability on an adult who purchased alcohol for a minor. The court used a penal statute which made it unlawful to purchase liquor for a minor. In *Sneath v. Popiolek*,¹²⁸ a Michigan appeals court applied a statute which prohibited the consumption of alcoholic beverages on public highways and the transportation of an open bottle to impose liability on a passenger who supplied alcohol to an intoxicated driver.

This confusion indicates that courts should avoid applying these penal statutes in a private setting, especially in an area so heavily regulated by the legislature. Courts are struggling to interpret these statutes. The clear trend is to hold that the statutes do not apply to social hosts. According to one commentator on the interpretation of criminal statutes, "the obvious conclusion must usually be that when the legislators said nothing about it, they either did not have the civil suit in mind at all, or deliberately omitted to provide for it."¹²⁹ Furthermore, many of these statutes appear in the liquor industry statutory sections. Some legislatures are reacting by writing clearer statutes. California is probably the extreme.

COMMON LAW NEGLIGENCE PRINCIPLES

The final way to impose liability on a social host is to plead negligence regardless of a penal statute. Once the court establishes that a dram shop act does not preempt the field, this theory is the best way to impose liability. It enables the court to avoid statutory construction by establishing that a social host owes a general duty to the victim. Traditional negligence principles impose a duty to control the conduct of another if there is some relationship between the parties.¹³⁰ The defendant breaches the duty by failing to take precautions against the negligence of another if "a reasonable person would recognize the existence of an unreasonable risk of harm to others through the third person's negligence."¹³¹

The duty becomes most obvious if the actor "has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things."¹³² The court must then multiply the probability that negligence will occur by the multitude of harm likely to result, and it must weigh the result against the burden upon the defendant of exercising such care.¹³³ The duty of a social host can be found under these principles because

¹²⁷427 So. 2d 1329 (La. App. 1983).

¹²⁸135 Mich. App. 17, 352 N.W.2d 331 (1984).

¹²⁹Keeton, *supra* note 75, at 221. The inquiry into a statute's "implied" or "presumed" intent to provide tort liability has been called a pure fiction. *Id.*

¹³⁰*Id.* at 202.

¹³¹*Id.* at 199.

¹³²*Id.* at 199.

¹³³*Id.*

the host who serves an intoxicated guest can reasonably foresee that the guest may be involved in an accident. Certainly, the burden on the host to take precautions is not too high because the host can drive the guest home or arrange for a ride.¹³⁴ Although the negligence theory applies, courts may refuse to use it for various reasons. The court might leave the imposition of liability to the legislature or the court's judgment might expressly or implicitly be governed by public policy reasons. One commentator has offered the following reason for not imposing liability on social hosts:

First, it is unclear that the social host is as aware of the risks involved with serving alcohol to high risk individuals as the vendor. Second, the social host cannot control the service of alcohol as effectively as the vendor. Thus, the statutes create a standard which would unfairly expose the social host to liability.¹³⁵

In *Halvorson v. Birchfield Boiler, Inc.*,¹³⁶ the Supreme Court of Washington refused to adopt a common law rule of liability against an employer. Instead, the court deferred to the legislature. However, in dicta the court discussed an exception for people who serve "obviously intoxicated persons."¹³⁷ A Washington appeals court in *Halligan v. Pupo*¹³⁸ used this language and applied it as a recognized exception to the rule of nonliability. Pennsylvania courts have done similar things. In *Klein v. Raysinger*,¹³⁹ a Pennsylvania superior court held that a host who served an intoxicated adult could not be liable at common law. On the same day, the same court in *Congini v. Portersville Valve Co.*¹⁴⁰ held an employer liable for serving a minor. Another superior court applied the *Klein* holding where an adult became intoxicated at a non-commercial social event sponsored by the Ireland Athletic Association on the premises of the Knights of Columbus.¹⁴¹ However, the court limited its holding to a purely social gathering sponsored by a non-commercial organization, and left the door open for a case where the organization opens its doors to the general public and/or receives consideration for the liquor served, even if it does not hold a license under the liquor code.¹⁴²

The courts which do impose liability on gratuitous servers ignore legislative action or inaction because the courts feel it is within their province to apply common law principles. Not surprisingly, the first case to do so involved a

¹³⁴*Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983).

¹³⁵*Graham*, *supra* note 80, at 577. The author ultimately concluded that the proximate cause and duty analysis should be reexamined. *Id.*

¹³⁶76 Wash.2d 759, 458 P.2d 897 (1969).

¹³⁷*Id.* at 763, 458 P.2d at 900.

¹³⁸37 Wash. App. 84, 678 P.2d 1295 (1984).

¹³⁹302 Pa. Super. 248, 448 A.2d 620 (1982), *aff'd*, 470 A.2d 507 (1983).

¹⁴⁰470 A.2d 515 (Pa. 1983).

¹⁴¹*Sites v. Cloonan*, 477 A.2d 547 (Pa. Super. 1984).

¹⁴²*Id.* at 548, n.2.

minor and an organization. In *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*,¹⁴³ the plaintiff sued a fraternity for injuries sustained when an intoxicated minor drove into a building and injured the plaintiff — a passenger in the car. The court held that the fraternity was negligent because the fraternity conducted the party, invited minors, and served alcoholic beverages.¹⁴⁴ The fraternity's "status as host and its direct involvement in serving liquor"¹⁴⁵ to the minor was sufficient to impose a duty to prevent the minor from causing an unreasonable risk. In 1979 the Oregon Legislature took matters in hand by enacting specific statutes. Or. Rev. Stat. § 30.960 now provides "... no licensee, permittee or social host shall be liable to third persons injured by or through persons not having reached 21 years of age . . . unless it is demonstrated that a reasonable person would have determined that identification should have been requested"¹⁴⁶ The state has enacted a similar statute establishing the liability of a private host who serves a visibly intoxicated guest.¹⁴⁷ While these statutes do not overrule the *Wiener* decision, they do limit it.

At present, New Jersey has developed the most far-reaching rule of liability.¹⁴⁸ The state began the trend for finding liability against tavernkeepers in *Rappaport*, and it has now extended the rule to private social hosts as well. An examination of the decisions discloses that the state's courts feel strongly about this rule and intend to keep it. As yet, the legislature has not overruled the decisions.

In *Linn v. Rand*,¹⁴⁹ a New Jersey Superior Court used its reasoning from *Rappaport* to hold that a social host who serves excessive amounts of alcohol to a visibly intoxicated minor, knowing that the minor is about to drive a car on public highways, could reasonably foresee or anticipate an accident or injury as a reasonably foreseeable consequence of his negligence in serving the minor.¹⁵⁰ The court articulated its strong feelings by stating "[t]he fact that a plaintiff may have a heavier burden of proof to carry when his suit is against a social host, does not warrant granting such host immunity from liability."¹⁵¹ In 1982, a New Jersey trial court held that a social host is liable for furnishing alcohol to an obviously intoxicated adult, but this case was never appealed.¹⁵²

¹⁴³258 Or. 632, 485 P.2d 18 (1971).

¹⁴⁴The court first found that the individual fraternity member was not liable under negligence per se principles and that none of the defendants were liable under the dram shop act. However, the court found that the dram shop act did not preempt the field. The court also refused to hold the rental hall owners liable for providing only the facility.

¹⁴⁵*Wiener*, 258 Or. at 637, 485 P.2d at 23.

¹⁴⁶OR. REV. STAT. § 30.960 (1981).

¹⁴⁷See OR. REV. STAT. § 30.955 (1981).

¹⁴⁸The California courts also developed the rule in *Coulter*, 21 Cal.3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), but the legislature subsequently overruled the case.

¹⁴⁹140 N.J. Super. 212, 356 A.2d 15 (1976).

¹⁵⁰*Id.*, 140 N.J. Super. at 219, 356 A.2d at 19.

¹⁵¹*Id.*, 140 N.J. Super. at 217, 356 A.2d at 18.

¹⁵²*Figuly v. Knoll*, 185 N.J. Super. 477, 449 A.2d 564 (1982).

Many courts and commentators speculated about the ramifications of the rulings and the state of the law in New Jersey. The California cases had been overruled and the *Wiener* case involved an organization. New Jersey was the first state in which the legislature did not restrict or overrule the decision to hold a social host liable on negligence theories.

In the summer of 1984, the New Jersey Supreme Court answered these questions in *Kelly v. Gwinnell*.¹⁵³ In this case, Donald Gwinnell stopped at Joseph Zak's house for a drink after Gwinnell drove Zak home.¹⁵⁴ The testimony disclosed that Gwinnell spent an hour or two at Zak's home, during which time Zak served him two or three drinks of scotch.¹⁵⁵ Zak walked with Gwinnell to his car, and Zak watched Gwinnell drive away.¹⁵⁶ On his way home Gwinnell was involved in a head-on collision.¹⁵⁷ Tests disclosed that he had a blood alcohol concentration of 0.286 percent.¹⁵⁸ An expert concluded that Gwinnell had not consumed two or three scotches but rather the equivalent of thirteen drinks, that he showed unmistakable signs of intoxication, and that he was in fact severely intoxicated while at Zak's home and at the time of the accident.¹⁵⁹

The court held that a social host who allows an adult guest at his home to become drunk is liable to the victim for an automobile accident caused by the drunken driving of the guest.¹⁶⁰ New Jersey has no dram shop act and past New Jersey cases extended the liability only to gratuitous servers of minors.¹⁶¹ Thus, this court could not take the same approach of other courts regarding the exclusivity of dram shop acts. The court also dismissed any claim that this issue is solely for the legislature.¹⁶²

The court reasoned that immunization of hosts is not a result of negligence law because negligence concepts clearly apply.¹⁶³ Under the present facts, the social host provided the guest with liquor knowing that the guest would be driving home. "[O]ne could reasonably conclude that the Zaks must have known that their provision of liquor was causing Gwinnell to become drunk."¹⁶⁴ Further, the court rejected any distinction between licensees and

¹⁵³96 N.J. 538, 476 A.2d 1219 (N.J. 1984).

¹⁵⁴*Id.* at 541, 476 A.2d at 1220.

¹⁵⁵*Id.*

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰*Id.* at 548, 476 A.2d at 1224.

¹⁶¹*Id.* at 542, 476 A.2d at 1221.

¹⁶²*Id.* at 551, 476 A.2d at 1226. The court also distinguished cases in other jurisdictions which have left the decision to the legislature. The court did so because most of those states have dram shop acts. *Id.* at 552, 476 A.2d at 1227.

¹⁶³*Id.* at 542, 476 A.2d at 1221.

¹⁶⁴*Id.*

social hosts.

After applying the negligence principles, the court allowed policy considerations to govern its holding. The court stated:

[W]hile we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of just compensation to the victim of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values.¹⁶⁵

This decision was clearly motivated by the war on drunken driving and the trend in New Jersey toward imposing liability. Much of the language resembles that of *Rappaport*. The court was not overly concerned with statistics, stating that it believed that there was "change" in social attitudes and customs concerning drinking¹⁶⁶ and that this decision was consistent with the change.

There are many implications in this decision. It will be difficult to interpret the phrase "directly serves" and to determine whether a host has control of individuals at a party. At least one court has refused to impose liability on a social host who provided liquor to an uninvited guest.¹⁶⁷ Another court refused to hold liable a sister who permitted her younger sister to host a party where minors would be present.¹⁶⁸ These considerations have already caused courts to distinguish between business-employer hosts and social hosts.¹⁶⁹ These courts feel more comfortable with imposing liability because the employer is involved in a master-servant relationship with its employees. However, one thing is clear in New Jersey. The state's courts intend to stand by the decision. The same court has already referred to the decision as an indication of the "clear public policy of this State" to rid the highways of drunken drivers.¹⁷⁰ Also, in *Davis v. Sam Goody Inc.*,¹⁷¹ a New Jersey appeals court relied on *Kelly* to hold a commercial host liable to a third party for damages as a result of an intoxicated guest. The court stated that "[i]t is abundantly clear to us that liability in this State depends not on the nature or character of the supplier of the alcoholic beverage nor on whether the tort-feasor is a minor or an adult. Rather, liability depends upon 'conventional negligence analysis' . . . respecting

¹⁶⁵ *Id.* at 543, 476 A.2d at 1224.

¹⁶⁶ *Id.* at 548, 476 A.2d at 1229.

¹⁶⁷ *Heldt v. Brei*, 118 Ill. App. 3d 798, 455 N.E.2d 842 (1983).

¹⁶⁸ *Walker v. Kennedy*, 338 N.W.2d 254 (Minn. 1983).

¹⁶⁹ *Chastain v. Litton Systems, Inc.*, 694 F. 2d 957 (4th Cir. 1982) *cert. denied*, 103 S. Ct. 2454 (1983).

¹⁷⁰ *State v. Dyal*, 97 N.J. 229, 478 A.2d 390, 394 (1984).

¹⁷¹ 195 N.J. Super. 423, 480 A.2d 212 (1984).

foreseeability."¹⁷²

Courts will resolve this issue differently and many courts uncomfortable with this holding will continue to make distinctions. The *Kelly* decision developed from a clear trend within the jurisdiction, but it is unclear whether or not other states with dram shop acts or states which do not recognize a common law rule of negligence of business proprietors will adopt this rule. However, the common law theory is the best theory because it is totally consistent with negligence principles. Unless the New Jersey legislature speaks on the issue, the decision will stand.

CONCLUSION

It is improbable that we will see a majority rule emerge on this issue. While the imposition of liability on liquor licensees is more justifiable, courts will be forced to weigh the policy concerns against drunk driving and public intoxication, and the policy of holding a purely private individual liable for the accident of a guest. The courts and legislatures must act on this issue. Legislatures should clarify statutes. In states where legislatures do not do so, courts wishing to impose liability should apply common law theories and thereby avoid statutory construction problems. But as long as these accidents occur, it is probable that state courts and legislatures will continue to dispute the issue.

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¹⁷²195 N.J. Super. at 424, 480 A.2d at 213.

